

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

NO. 00-M-1926

MONIQUE A. COLLINS

V.

ROGER P. COLLINS

[NOTE: This order has been redacted before placement on the court's web site to protect the financial privacy of the parties. Portions that have been redacted are indicated by []. The full order is a public record and may be examined at the Hillsborough County Superior Court-Northern District.]

**FINAL DECREE OF DIVORCE**

The above captioned divorce action was tried to the court over seven days between September 17 and September 28, 2001. Both parties were represented by counsel.

The main issues in dispute concern: (1) whether plaintiff is entitled to a divorce on the grounds of some form of marital "fault;" (2) whether certain property should properly be considered part of the marital estate; (3) the value of certain assets of the estate; (4) the manner in which the estate should be divided; and (5) the amount and duration of alimony plaintiff should receive. After briefly reciting the pertinent background facts, the court addresses these issues in turn below.

**I. FACTUAL BACKGROUND**

The parties were married in 1969 and separated on October 4, 2000. This was the first and only marriage for each party. Both

parties are 58 years of age. They have three adult children. The defendant is an optometrist who maintains a private practice in Manchester. The plaintiff holds a bachelor of arts degree. Prior to and during the early years of the marriage, plaintiff was employed as a school teacher. She also worked for approximately thirteen years as an office manager/administrative assistant to the defendant, and more recently she was employed as a travel agent. Since March 2001, plaintiff has been out of work as a result of an on-the-job injury, for which she receives workers' compensation benefits.

Throughout the course of the marriage, the defendant was the primary breadwinner for the family. Although, plaintiff worked outside the home at various times, her income was always substantially less than that earned by the defendant. Plaintiff was the primary care giver for the children when they were growing up. During the marriage, the parties enjoyed an upper middle class life style, which included the ownership of a vacation home and two time-share condominiums, frequent travel within and outside the United States, and the funding of the college educations of their three sons without incurring any significant indebtedness.

## II. GROUNDS OF DIVORCE

The first issue which must be addressed is the grounds upon which the divorce should be granted. Plaintiff seeks a divorce on one or another of the following fault grounds: (a) adultery; (b) extreme cruelty; (c) treatment injurious to health or reason. See

RSA 458:7, II, III, V (Supp. 2000). Defendant, on the other hand, asks that a divorce be granted on the grounds of irreconcilable differences.

The factual basis underlying all three fault grounds asserted by plaintiff is defendant's conduct in engaging in homosexual relations with another man. The defendant admits that he engaged in oral sex with a man over the Labor Day weekend of 2000. He insists that, aside from an unexpected incident of sexual touching between himself and another man in 1998, this was the only sexual activity he had ever engaged in with anyone outside of the marriage prior to the time he and the plaintiff separated. Plaintiff suggests, based primarily on her interpretation of diaries of the defendant which she discovered, that the defendant must have engaged in homosexual activity prior to this time. The court finds, however, that the evidence is not sufficient to establish that defendant engaged in sexual relations with another man prior to Labor Day weekend of 2000.

Plaintiff also argues that even if there was only the one act of oral sex over Labor Day weekend, that act constitutes adultery and was the cause of the breakdown of the marriage. The court rejects this argument for two reasons. First, the court concludes that the oral sex performed on the defendant by another man over the Labor Day weekend 2000 does not constitute adultery as a matter of law. Some courts have held that adultery occurs when a spouse enters into "a personal, intimate sexual relationship with any other person, irrespective of the specific sexual acts

performed, the marital status, or the gender of the third party." S.B. v. S.J.B., 609 A.2d 124, 127 (N.J.Super.Ch. 1992); see also RGM v. DEM, 410 S.E.2d 564, 567 (SC 1991) ("homosexual sexual activity constitutes adultery"); Owens v. Owens, 274 S.E.2d 484, 485-86 (Ga. 1981) ("both extramarital homosexual, as well as heterosexual, relations constitute adultery"); Menge v. Menge, 491 So.2d 700, 702 (La.App. 1986) (oral sex can constitute adultery); Patin v. Patin, 371 So.2d 682, 683 (Fla.App. 1979) (suggesting that extramarital homosexual activity is adultery). However, these decisions do not reflect the law in New Hampshire. RSA 645:3 (1996) provides that a person is guilty of adultery "if, being a married person, he engages in sexual intercourse with another not his spouse or, being unmarried, engages in sexual intercourse with another known by him to be married." (Emphasis added.) Although this is a criminal statute, in the absence of any indication the legislature intended a different definition to apply for purposes of divorce law, the court concludes that this definition is controlling under RSA chapter 458.

"Sexual intercourse" is nowhere defined in New Hampshire statutory law. A standard dictionary definition of "sexual intercourse" is "genital contact, esp. the insertion of the penis into the vagina followed by orgasm; coitus; copulation." The Random House Dictionary of the English Language p. 1755 (2d ed. 1987). Although this definition would arguably support the view that "sexual intercourse" can mean more than simply vaginal

intercourse between a man and a woman,<sup>1</sup> other provisions of New Hampshire law evince a contrary legislative intent. RSA 632-A:1, V (Supp. 2000) defines the term "sexual penetration" in such a fashion that it includes "sexual intercourse" as well as various other sexual acts (i.e., cunnilingus, fellatio, anal intercourse, etc.). If the legislature understood that the term "sexual intercourse" included not only vaginal intercourse between a man and a woman but also all these other forms of sexual penetration, there would have been no need for this definitional section of the law to list all the types of sexual activity specified in subsections (b) through (f) of RSA 632-A:1, V. That the legislature did find it necessary to list these other acts supports the view that the legislature intended the term "sexual intercourse" to cover only vaginal intercourse between a man and a woman. See Appeal of Derry Educ. Assoc., 138 N.H. 69, 71 (1993) ("Basic statutory construction requires that all of the words of a statute must be given effect and that the legislature will not be presumed to have used superfluous or redundant words."). Plaintiff may have a valid point that New Hampshire's adultery law should be updated to reflect present day realities concerning the more open expression of homosexual orientation, but this argument must be addressed to the legislature, not this court.

Second, even assuming arguendo that homosexual "sexual

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<sup>1</sup> See also the definition from Webster's New Collegiate Dictionary, quoted in Menge, 491 So.2d at 702.

penetration" would fit the legal definition of adultery, the court finds that the oral sex which the defendant engaged in with another man over the Labor Day weekend 2000 was not the cause of the breakdown of the marriage. See Ebbert v. Ebbert, 123 N.H. 252, 254 (1983) (adultery must be primary cause of the breakdown of the marriage for court to grant divorce on this grounds). It is important at this point to draw a distinction between the defendant's acknowledged status as a homosexual, on the one hand, and the specific sexual act he committed over Labor Day weekend, on the other. There is no doubt in this court's mind that the homosexual feelings which the defendant has struggled with for many years was the cause of the breakdown of the marriage. But under New Hampshire law, such feelings or emotional yearnings are not enough to constitute adultery. This would be true even when such feelings or yearnings are directed toward members of the opposite sex, and even if -- which is not the case here -- they are directed toward a specific member of the opposite sex. Thus, the mere fact that a married man may have a strong emotional attachment to, or romantic interest in, a particular woman other than his wife, does not constitute adultery. Although the proof may be circumstantial,<sup>2</sup> in order to grant a divorce on the ground

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<sup>2</sup> Insofar as plaintiff suggests that Yergeau v. Yergeau, 132 N.H. 659 (1990) and Jeanson v. Jeanson, 96 N.H. 308 (1950) stand for the proposition that there need be no "actual proof" of the sex act in order to sustain a finding of adultery, the court disagrees. What these cases hold is that there need be no direct proof of adultery. But while circumstantial evidence of "opportunity and inclination" can be sufficient for the fact finder to infer that the adulterous act did indeed occur, the

of adultery it must be shown that the married person actually engaged in the act of sexual intercourse with a person other than his or her spouse, and that such act or acts was the cause of the breakdown of the marriage.

In this case, the court credits the testimony of the defendant that, at least as early as 1992, he told the plaintiff of his attraction to men, and that he continued to struggle with his feelings regarding his sexual orientation throughout the succeeding years, all the time growing increasingly depressed and unhappy, until he finally succumbed to his desires over the 2000 Labor Day weekend. It also is important to note that during this period of eight or more years, the defendant's attraction to men was not directed (for more than perhaps fleeting moments) at any one particular individual. This simply is not a case where it can fairly be said that the defendant "left the plaintiff for another [man] or [woman]." Rather, the defendant left the plaintiff because he finally realized that he was gay and that he could not continue to suppress his true feelings. In sum, the court finds that the primary cause of the breakdown of this marriage was the defendant's homosexuality, and that this status would have resulted in the defendant's leaving the marriage regardless of whether he had engaged in the act of oral sex over the Labor Day

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important point is that the fact finder must actually draw this inference and make such a finding. If the fact finder does not draw this inference (which of course is not compelled, even when evidence of "opportunity and inclination" is offered), then a divorce on the ground of adultery cannot be granted.

weekend.

Since the act of oral sex was not the cause of the breakdown of the marriage, a divorce on the grounds of adultery would not be warranted even if oral sex is an act that constitutes "adultery" under RSA 458:7, II.

The court also rejects plaintiff's assertion that defendant's homosexuality, and the sexual conduct he engaged on and after<sup>3</sup> Labor Day 2000, constitute either "extreme cruelty" or "treatment so as to seriously injure health or endanger reason." The court agrees with defendant that the cases in which a divorce has been granted on these grounds under New Hampshire law all involved situations wherein the "guilty" party subjected his or her spouse to physical or verbal abuse or other reprehensible conduct. See Routhier v. Routhier, 128 N.H. 439 (1986) (divorce on ground of injury to health and endangering reason where husband admitted to affairs, drank excessively, and was domineering, argumentative and verbally abusive); Tibbetts v. Tibbetts, 109 N.H. 239 (1968) (divorce on ground of extreme cruelty upheld where there was evidence that husband had been seeing another woman, was cross and disagreeable when he had been drinking, and had physically hurt wife on at least two occasions); Morgan v. Morgan, 101 N.H. 470 (1958) (extreme cruelty and treatment to endanger health found where husband was physically and verbal abusive and threatened to

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<sup>3</sup> Defendant does not deny that, since he and the plaintiff separated on October 4, 2000, he has engaged in additional sexual activity with one or more males.



kill wife); Szulc v. Szulc, 96 N.H. 190 (1950) (husband drank to excess, used abusive and profane language toward wife, and prevented her from sleeping; held: divorce on ground of treatment seriously injurious to health was justified). Nothing remotely approaching the conduct found in the foregoing cases is present here. There is absolutely no evidence that, during the course of the parties' thirty-two year marriage, the defendant ever subjected the plaintiff to physical or verbal abuse. Indeed, aside from the difficulties resulting from defendant's emerging recognition of his homosexuality, the parties appear to have enjoyed a basically sound interpersonal relationship. Therefore, to accept plaintiff's position, the court would have to hold that defendant's homosexuality, in itself, constitutes extreme cruelty and/or treatment so as to seriously injure health or endanger reason. This the court is unwilling to do.

For the reasons stated above, the court finds that a divorce on the grounds of defendant's marital fault is not justified. At the same time, it is clear to the court that defendant's recognition of his homosexuality has resulted in irreconcilable differences which has caused the irremedial breakdown of the marriage. Therefore, the court will grant a divorce to the plaintiff on this ground.

Although the court does not find the defendant at "fault" simply because of his sexual orientation, the court also believes it important to recognize the reality that the defendant came to terms with his homosexuality quite late in life. It is clear from

the record that plaintiff devoted substantial physical and emotional energies over many years to the parties' marriage, and that the defendant's change of course at this stage of the parties' lives has not only caused the plaintiff mental distress, but also will inevitably result in a reduction of both parties' standard of living. In effectuating an equitable division of the marital estate, the court believes that it may properly take account of the fact that defendant's late-in-the-game change of course was unwanted by the plaintiff and has upset her strong and justifiable reliance interest in the pre-existing status quo.

### III. THE MARITAL ESTATE

Before determining an equitable division of the marital estate, the court must first resolve several dispute concerning the composition of the estate and the value of certain properties which are part of it.

#### A. Merrill Lynch Account # []

The first dispute concerns whether the funds held in Merrill Lynch account # [] should be included within the marital estate. The plaintiff argues that they should be included, whereas the defendant takes the position that these funds actually belong to his elderly mother, Rita Collins, and that he is holding them as trustee for her. In order to assure that the court's ruling on this issue would be binding not only on the plaintiff and the defendant, but also on defendant's mother, the court, over the

objection of plaintiff, permitted Irene Lariviere,<sup>4</sup> as attorney in fact for Rita Collins, to intervene as a party defendant for this limited purpose.

The evidence pertinent to this account is as follows. The defendant's mother is 82 years old. She currently resides in an assisted living facility in Hampton, New Hampshire. Defendant's father died on February 4, 2000. By transfers accomplished both before and after his death, defendant's father transferred to the defendant and his two sisters certificates of deposit totalling [ ]. Defendant and his two sisters each received one-third of this amount. Although the defendant and his sister testified that it was the intent of defendant's father that these funds be utilized for the continuing care of defendant's mother, the court rejects this testimony for a number of reasons. First, the monies were transferred to each child without any written documentation evidencing a restriction on use of the funds. Second, the defendant's share of these funds was placed into an account in defendant's name only, and the income earned on this account was reported on the parties' joint federal income tax return for the year 2000. Third, unlike the proceeds of the sale of the home of defendant's mother, which were placed into a single account controlled by Ms. Lariviere, the proceeds of the certificates of deposit were divided among the three children. Division of the proceeds in this fashion is inconsistent with the notion that the

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<sup>4</sup> Irene Lariviere is the defendant's sister.

funds were to be used for defendant's mother -- because such use would entail a cumbersome procedure by which each of the three children would have to be involved in paying a portion of the mother's expenses from the funds in that child's hands. By contrast, the proceeds from the sale of Rita's home are in a single account controlled by Lariviere, which makes it a simple matter for her to use the account to pay the necessary expenses of Rita's care. In short, the treatment of the home sale proceeds is consistent with the dedication of those funds to the use of defendant's mother, whereas the treatment of the proceeds from the various certificates of deposit is not.

Fourth, and perhaps most significant, on two occasions the defendant used the funds in this account for his own purposes which had nothing whatsoever to do with the care of his mother. On one occasion, the defendant used monies in this account to buy plaintiff a new car; and on a second occasion, the defendant pledged the account as collateral for a loan used to purchase the parties' Hampton condominium. Although the defendant testified that he sought approval from his two sisters before both of these transactions, the court does not find this testimony credible. The court notes that the Merrill Lynch account representative who testified at trial indicated that the defendant never made any mention of needing his sisters' approval before utilizing the monies in this account for his own purposes. Finally, the value of account # [] was included among the assets listed in the asset summary prepared by Merrill Lynch as part of the parties'

financial planning.

In sum, the court finds that account # [] is an asset of the defendant, not his mother, and is properly includable in the marital estate of the parties.

B. Value of 395 South Main Street

The parties disagree as to the value of the three story property located at 395 South Main Street, Manchester. The defendant operates his optometrist practice from the first floor of this property, and the two upper floors contain residential apartments. The plaintiff's expert appraiser opined that this property has a fair market value of \$235,000.00, whereas the defendant's expert determined the property's fair market value to be \$150,000.00. Although the court does not completely accept either appraiser's opinion, the court finds the analysis of defendant's appraiser much closer to the mark than that of plaintiff's appraiser. The most glaring weakness of plaintiff's appraiser is that his comparable sales analysis relied largely on comparable properties that are located in the north end of Manchester. The north end clearly is a much more prestigious and exclusive area than the west side neighborhood where the subject property is located. Yet plaintiff's expert made no adjustments for this difference in location. In addition, the court also finds unpersuasive the use by plaintiff's expert of a single square foot value for both the first floor office space and the second and third floor residential units of the property.

On the other hand, while the court is in general agreement with the approach taken by the defendant's appraiser, the court finds that he underestimated to some extent both the fair rental value of the first floor office space and the fair rental value of the two upstairs apartment units. After considering all relevant evidence, the court finds that the fair market value of 395 South Main Street is \$170,000.00.

#### C. Value of Defendant's Optometry Practice

The court has carefully considered the testimony of defendant's business valuation expert, and finds such testimony useful to a point in determining the value of defendant's optometry practice. However, the court does not agree with certain of the assumptions utilized by this expert. To cite but two examples, the court is not persuaded that it is appropriate to utilize a 15% discount to account for lack of marketability of defendant's practice; and the court also disagrees with the expert's use of a 20% collectability discount on defendant's accounts receivables when the evidence failed to show any historical support for this figure based on the actual experience of defendant's practice over the years.

Based on all the evidence presented, the court finds that the fair market value of defendant's optometry practice is \$100,000.00. The court notes that this value is consistent with that listed for defendant's business in the financial planning summary prepared by Merrill Lynch.

#### IV. DIVISION OF THE ESTATE

Although neither party has made any real effort to be consistent in valuing the marital estate as of a particular point in time, the court finds that December 31, 2000, represents a convenient date to do so, since it is only a few days after the libel was filed, and, being the end of the year, there are brokerage statements available to establish the value of the parties' various investment accounts as of that date. The total approximate value of the marital estate as of this date was \$1,390,423.00, calculated as follows:

Property at 375 Coolidge Ave., Manchester (equity above mortgage)	\$ []
Furniture and furnishings at 375 Coolidge Ave. <sup>5</sup>	\$ []
Lot adjacent to 375 Coolidge Ave.	\$ []
Condominium at 445 Ocean Blvd., Hampton (equity above mortgage)	\$ []
Time share, Cozumel, Mexico	\$ []

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<sup>5</sup> The plaintiff claimed that the value of the contents of 375 Coolidge Avenue was only \$10,000.00. Basing his estimate on the original cost of purchase of various items, the defendant claimed the value of the contents was approximately \$50,000.00. The court finds that \$25,000.00 represents a reasonable estimate of the value of the contents of 375 Coolidge Avenue. The court also notes that this figure represents the value of the furniture and furnishings remaining at the property after the award of certain items of personal property to the defendant, as reflected in this decree. The parties made no credible effort to establish the value of any particular items of personal property, and consequently the court is unable to assign a value to the relatively few items of personal property from 375 Coolidge Avenue which the court has awarded to the defendant. Nonetheless, the court is satisfied that the total value of such items awarded to the defendant is quite small, and certainly not significant enough to affect the overall fairness of the property division.

Time share, Rockport, Maine	\$ []
Property at 395 South Main St., Manchester	\$ [] <sup>6</sup>
Defendant's Optometry Practice	\$ []
Merrill Lynch Account # []	\$ []
Merrill Lynch Account # []	\$ []
Merrill Lynch Account # []	\$ [] <sup>7</sup>
Merrill Lynch Account # []	\$ []
Merrill Lynch Account # [] (defendant's KEOGH)	\$ []
Merrill Lynch Account # [] (defendant's IRA)	\$ []
Merrill Lynch Account # [] (defendant's Roth IRA)	\$ []
Merrill Lynch Account # [] (plaintiff's IRA)	\$ []

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<sup>6</sup> The court rejects the defendant's argument that the value of this asset should be reduced by the amount of capital gains tax defendant will have to pay when he sells the building. Under the court's alimony order, the defendant will be required to continue working until he reaches the age of 65. Therefore, this building will almost certainly not be sold until that time. It is entirely too speculative to decide now what capital gains tax will be due -- or even if this tax will still exist -- at a time of sale some seven years in the future. Furthermore, the court notes that the marital estate also includes other non-retirement assets, i.e. securities, which might be subject to a capital gains tax on sale. Yet the defendant has offered no suggestions as to how the tax on these assets should be accounted for in the property division.

<sup>7</sup> This value reflects plaintiff's 25% interest in this account before she made a withdrawal of \$10,000.00 from the account.



Merrill Lynch Account # [] (plaintiff's Roth IRA)	\$ []
1999 Chrysler Sebring (plaintiff's vehicle)	\$ []
1955 Lincoln Town Car (defendant's vehicle)	\$ [] <sup>8</sup>
Tax Rebate	\$ <u>   </u> []
Total	\$1,390,423.00

Under the circumstances of this case, the court finds that an equal division of the estate is fair and equitable to both parties.

Of the total value of the estate, \$505,524.00 was held in retirement account as of December 31, 2000. Since these retirement accounts were invested in stocks, mutual funds, etc., the court recognizes that the recent decline in the stock market has likely resulted in a significant reduction in the value of these accounts. However, since neither party has made any withdrawals from these accounts since December 31, 2000, the court finds that the fairest way to split these accounts is simply to order that all securities and other assets held in each retirement account be equally divided between the parties. In this way, the parties will share equally in any reductions in value resulting

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<sup>8</sup> This vehicle is carried on the books of defendant's business. However, since it was not considered as an asset of the business by defendant's expert in arriving at his opinion concerning the value of the corporation, and since it seems clear that defendant uses this vehicle primarily for personal purposes, the court treats it as his personal asset.

from the decline of the market. But any contributions made to these accounts since December 31, 2000, and the gains, earnings or losses attributable to such contributions, will be awarded solely to the party that made the contribution.

Aside from the retirement accounts, the remaining assets in the estate have a value of \$884,899.00. This means that, from the non-retirement portion of the estate, each party should receive assets having an approximate value of \$442,450.00. The court finds that this division can be accomplished by awarding to the plaintiff the following assets: (a) the house and its furniture and furnishings located at 375 Coolidge Avenue, (b) the building lot adjacent to 375 Coolidge Avenue, (c) the Rockport, Maine time-share, (d) Merrill Lynch account # [], (e) plaintiff's 25% interest in Merrill Lynch account # [], and (f) the 1999 Chrysler Sebring. The total value of these assets is \$366,878.00, which leaves a shortfall of \$75,572.00. To account for this shortfall, the defendant shall be ordered to transfer to the plaintiff from Merrill Lynch accounts # [] or [] (or some combination of the two) stocks, securities or cash having a value of \$75,572.00.<sup>9</sup>

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<sup>9</sup> The court recognizes that, by requiring defendant to transfer to plaintiff securities in one or both of these accounts which have a present value of [], the defendant is forced to bear the risk of any decline in the value of these accounts which may have resulted from market forces between December 31, 2000, and the time when the transfer occurs. However, the court does not believe that this is unfair, inasmuch as the division of non-retirement assets effectuated by the court places a somewhat disproportionate share of securities in the plaintiff's hands. By contrast, the defendant's share of the estate contains a larger percentage of real estate and other assets not likely to have depreciated in value from December 31, 2000 to the present

All other assets of the estate are awarded to the defendant. However, as explained below, in order to afford the plaintiff security for the alimony payments which the defendant must make, the defendant shall be required to execute a mortgage to the plaintiff covering the 395 South Main Street property.

#### V. ALIMONY

The defendant does not dispute that plaintiff is entitled to an award of alimony. Rather, the dispute between the parties concerns the amount of alimony to be paid and the period for which it should be paid. Plaintiff seeks alimony of \$5,000.00 per month for the period of approximately 6 1/2 years until she reaches the age of 65. Defendant proposes to pay alimony of \$2,700.00 per month, but only until such time as he (the defendant) decides to retire.

After considering the factors specified in RSA 458:19, I and IV(b) (Supp. 2000), the court finds that the most equitable manner of making an alimony award is to attempt, as nearly as possible, to equalize the incomes of the parties. The court believes that this methodology is appropriate given the length of the marriage, the lifestyle the parties enjoyed during the marriage, the age of the parties, the disparity in earning capacity between the parties, and the fact that the reasonable and necessary living expenses of the parties are approximately the same. As is almost  
(...continued)  
time.

always the case in a divorce, neither party will be able to maintain the same lifestyle he or she enjoyed when the parties were together. Equalizing their incomes will insure that the burden of the divorce is shared equitably.

The plaintiff is currently receiving workers' compensation benefits of approximately \$624.00 per month. However, based on the evidence presented at trial, the court finds that, notwithstanding her physical and emotional difficulties, plaintiff likely will be able to return to part time, light duty employment in the near future. The court also finds that, through such employment, plaintiff has the capacity to earn approximately \$12,000.00 per year.

The defendant operates his optometry practice as a professional corporation. Although he only takes a formal "salary" of approximately \$80,000.00 per year from the corporation, the evidence at trial made it clear that he actually receives a number of additional economic benefits from the corporation. Counting such things as his annual KEOGH contribution, car expenses, health club membership, and miscellaneous other "perks" which he receives through the corporation, as well as the rental income he receives from the two apartments at 395 South Main Street, the court finds that defendant's actual yearly income is approximately \$110,000.00 per year.

Accordingly, the parties have a combined yearly income of approximately \$122,000.00. Therefore, in order to equalize their

incomes, the defendant must pay the plaintiff alimony of \$49,000.00 per year. Rounded to an even figure, the defendant will be ordered to pay alimony to the plaintiff in the amount of \$4,100.00 per month. This is the same amount of alimony which defendant has been paying pursuant to the temporary order, and the court notes that the evidence at trial did not demonstrate that said alimony payments imposes an undue hardship on either party.

The plaintiff testified at trial that, since their separation, the defendant has repeatedly informed her that if the court "hits him too hard" in its final order, he will simply sell his business and retire. Although the defendant disputes having made such statements, the evidence indicates that, even before the parties separated, the defendant was seriously considering retiring early. When the parties were together, they may have had the financial wherewithal to make early retirement entirely feasible. But if the defendant was to retire early at this point, he would very likely be unable to afford to continue paying alimony while also supporting himself. Given the circumstances of this case, the court believes that it is not inappropriate to require that the defendant continue working until he reaches the normal retirement age of 65. Since plaintiff and defendant are basically the same age, this will insure that plaintiff continues to receive alimony payments until she reaches age 65.

The court believes it important and necessary to provide the plaintiff with at least some form of security for future alimony payments. To this end, the court holds that, although the

property at 395 South Main Street shall be awarded to the defendant, the defendant shall execute a mortgage on said property in favor of the plaintiff. Until defendant's alimony obligation has been fully satisfied, the mortgage will secure the then-remaining balance of said obligation. Once the alimony obligation has been fully satisfied, plaintiff shall discharge the mortgage.

#### VI. ORDERS

Based on the findings and analysis set forth above, the court hereby enters the following final orders:

A. Divorce: The plaintiff is granted a divorce from the defendant on the grounds of irreconcilable differences which have caused the irremedial breakdown of the marriage.

B. Alimony: The defendant shall pay alimony to the plaintiff in the amount of \$4,100.00 per month. Said alimony shall continue until plaintiff reaches the age of 65, unless plaintiff should die or remarry before age 65. The defendant's obligation to pay alimony shall constitute a charge against defendant's estate unless the defendant has provided for the satisfaction of the obligation through insurance.

C. Health Insurance: Until the plaintiff either reaches the age of 65 or qualifies for Medicare, whichever first occurs, the defendant shall provide, at his sole cost, health insurance coverage to the plaintiff through the defendant's business in the same manner as existed prior to the divorce. That is, defendant's business shall be responsible for the first \$5,000.00 per year of plaintiff's medical expenses, and the business shall provide

insurance for any medical expenses of plaintiff above \$5,000.00 per year.

D. Life Insurance:

The defendant shall maintain, at his sole cost, his First Colony life insurance policy in the face amount of \$200,000.00, naming the plaintiff as beneficiary until defendant's alimony obligation is fully satisfied.

The plaintiff is awarded all life insurance policies covering her life free and clear of any interest of the defendant.

E. Motor Vehicles:

The plaintiff is awarded the 1999 Chrysler Sebring free and clear of any interest of the defendant.

The defendant is awarded the 1995 Lincoln Town Car free and clear of any interest of the plaintiff.

F. Furniture and Other Personal Property:

The defendant is awarded those items of personal property located at 375 Coolidge Avenue which are specified on Exhibit A to defendant's proposed decree, except that the following items on said exhibit are awarded to plaintiff: stereo system, Faux Tiffany Lamp (den); Faux Tiffany Lamp (summer porch); Antique Venecian Picture (hallway/stairs); Blue Glass Collection (dining room); Crystal Brandy Sniffers (kitchen/washroom); Persian "Tree of Life" carpet (master bedroom); Kashar satin rug (small guest room); and coin collection (basement/garage/shed). Plaintiff also is awarded all other furniture, furnishings and personal property located at the 375 Coolidge Avenue property.

The defendant is awarded all furniture, furnishings and other personal property located at the condominium in Hampton, New Hampshire.

G. Pensions and Other Tax Deferred Assets: All securities, cash and other holdings in the parties retirement accounts, that is, Merrill Lynch accounts # [], [], [], [] and [], shall be divided equally between the parties based on the value of said holdings as of December 31, 2000. The parties shall share equally in all gains, earnings or losses attributable to their respective 50% interests in said accounts as of December 31, 2000. Any contributions made to any of these accounts since December 31, 2000, and the gains, earnings or losses attributable to such contributions, are awarded solely to the party who made the contribution.

H. Other Intangible Personal Property:

1. The plaintiff is awarded the following bank and/or securities accounts free and clear of any interest of the defendant:

St. Mary's Bank accounts # [], []  
and []

Merrill Lynch account # []

Plaintiff's 25% interest (less \$10,000.00) in  
Merrill Lynch account # []

2. After the payment to the plaintiff of \$75,572.00, which payment shall be made within thirty (30) days of this decree, the defendant is awarded the following bank and/or securities accounts



free and clear of any interest of the plaintiff:  
Bank of New Hampshire accounts # [] and  
[]

Merrill Lynch accounts # [] and []

I. Business Interests: The defendant is awarded all right, title and interest in and to the optometry practice known as Dr. Roger P. Collins Professional Association, and all income derived therefrom, free and clear of any interest of the plaintiff.

J. Allocation of Debts: Except as otherwise provided in this decree, each party shall be solely responsible for any indebtedness incurred by that party and shall hold the other party harmless therefrom.

K. Marital Homestead: The marital homestead at 375 Coolidge Avenue, Manchester, is awarded to the plaintiff, free and clear of any interest of the defendant. The plaintiff shall be solely responsible for the payment of all mortgages, taxes, insurance and other expenses associated with said property and shall hold the defendant harmless therefrom. Within thirty (30) days of this decree, the defendant shall execute a quit claim deed conveying his interest in said property to the plaintiff.

L. Other Real Property:

1. The plaintiff is awarded the building lot situated adjacent to the marital homestead and known as 375A Coolidge Avenue, free and clear of any interest of the defendant. The plaintiff shall be solely responsible for the payment of all mortgages, taxes, insurance and other expenses associated with

said property and shall hold the defendant harmless therefrom. Within thirty (30) days of this decree, the defendant shall execute a quit claim deed conveying his interest in said property to the plaintiff.

2 The defendant is awarded the condominium situated at 445 Ocean Boulevard, # 12, Hampton, New Hampshire, free and clear of any interest of the plaintiff. The defendant shall be solely responsible for the payment of all mortgages, taxes, insurance and other expenses associated with said property and shall hold the plaintiff harmless therefrom. Within thirty (30) days of this decree, the plaintiff shall execute a quit claim deed conveying her interest in said property to the defendant.

3. At such time as the defendant has fully satisfied his alimony obligation to the plaintiff pursuant to the terms of this decree, the defendant shall be awarded the property located at 395 South Main Street, Manchester, free and clear of any interest of the plaintiff. Within thirty (30) days of this decree, plaintiff shall execute a quit claim deed conveying her interest in said property to the defendant. Also within thirty (30) days of this decree, the defendant shall execute a mortgage in favor of the plaintiff covering said property. The mortgage shall secure the defendant's payment of the alimony obligations imposed upon him by this decree. Upon the full satisfaction of defendant's alimony obligation, plaintiff shall execute and deliver to the defendant a release of the mortgage. The existence of the mortgage referred to herein shall not in any way affect or limit plaintiff's right

or ability to proceed against any other assets of the defendant in the event the defendant fails to comply with his obligation to pay alimony.

Until such time as the mortgage is released, and so long as defendant remains current in the payment of his alimony, the defendant shall have the right to sole and exclusive use and enjoyment of the property at 395 South Main Street, and the sole and exclusive right to all rental income derived from said property. The defendant also shall be solely responsible for the payment of all taxes, insurance and other expenses associated with said property and shall hold the plaintiff harmless therefrom.

4. The defendant is awarded the time-share unit situated in Cozumel, Mexico, free and clear of any interest of the plaintiff.

The defendant shall be solely responsible for the payment of all mortgages, taxes, insurance and other expenses associated with said property and shall hold the plaintiff harmless therefrom. Within thirty (30) days of this decree, the plaintiff shall execute a quit claim deed conveying her interest in said property to the defendant.

5. The plaintiff is awarded the time-share unit situated in Rockport, Maine, free and clear of any interest of the defendant.

The plaintiff shall be solely responsible for the payment of all mortgages, taxes, insurance and other expenses associated with said property and shall hold the defendant harmless therefrom. Within thirty (30) days of this decree, the defendant shall execute a quit claim deed conveying his interest in said property

to the plaintiff.

M. Charges Against Estates: The obligations imposed upon each party pursuant to the terms of this decree shall constitute charges against their respective estates, inter vivos trusts or other similar estate planning vehicles, except that defendant's alimony obligation shall not be a charge against his estate to the extent said obligation is satisfied by insurance.

N. Execution of Documents: The parties shall execute any and all documents and take any and all actions necessary to effectuate the terms of this decree within thirty (30) days from the date the decree becomes final.

O. Miscellaneous:

The defendant is awarded the \$600.00 tax refund free and clear of any interest of the plaintiff.

Because the frequent flyer miles accumulated by the defendant cannot be transferred, the defendant shall devote 50% of the value of such frequent flyer miles as of December 31, 2000, to the purchase of airline tickets for the benefit of the plaintiff or her designee.

The court finds no basis for awarding either party attorney's fees in this case. Accordingly, each party shall be responsible for the payment of his or her own attorney's fees.

Pursuant to RSA 491:15 (1997), this decree incorporates the court's findings of fact and conclusions of law. Any of the parties' requests for findings and rulings not granted or denied herein, either expressly or by implication, are determined to be

unnecessary for resolution because they would not affect the decisions rendered.

So ordered.

October 25, 2001

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ROBERT J. LYNN  
Associate Justice